

SEPARATION OF CHURCH AND SCHOOL: GUIDANCE FOR PUBLIC CHARTER SCHOOLS USING RELIGIOUS FACILITIES

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National
Alliance
for Public
Charter
Schools



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EXECUTIVE SUMMARY



Public charter school leaders and advocates are dedicated to growing the number of high-quality public charter schools available to all families, especially those in communities where there are very few opportunities to attend a high-quality public school. To realize the promise that public charter school expansion can bring, public charter schools need reasonable access to facilities in every community. Recent reports suggest that public charter school leaders encounter an increasing number of barriers when seeking to access suitable public school buildings or the public funding needed to build new school facilities. Additionally, as the reality of public charter school expansion sets in, some opponents have resorted to blocking access to facilities as a new way to slow charter school growth. Without access to the facilities that will be needed to house the growing numbers of public charter school students, school leaders will be unable to keep pace with demand for seats in public charter schools. This gap between supply and demand suggests that priorities should be identifying and preserving other facilities as options to locate public charter schools.

One option currently available to public charter school leaders is to open a school in a facility owned or operated by a religious institution. Leasing a facility from a religious organization or locating a school in a former religious school building is often a very convenient and efficient option and provides a low-cost alternative to a traditional, district-owned school building. For years, choosing this option carried few legal risks and required public charter school leaders to do nothing more than consider the factors related to any typical real estate or leasing transaction. However, recent legal decisions, including one rendered by the U.S. Court of Appeals for the Seventh Circuit, *Doe ex rel. Doe v. Elmbrook School Dist.*,¹ have changed the landscape.

Litigants have been actively challenging public school decisions that result in a real or perceived affiliation with a religious organization. To date, the U.S. Supreme Court has not provided definitive guidance on precisely which activities result in a permissible public school affiliation with religious organizations and which will be considered unconstitutional. Accordingly, there is uncertainty as to what rules apply to public charter schools that want to operate in a facility owned or operated by a religious organization. The evolving state of the law raises questions about the extent to which a public charter school's decision to lease property from or otherwise locate on property owned or operated by a religious organization violates the Establishment Clause set forth in the First Amendment of the U.S. Constitution. Now, a lease arrangement between a public charter school and a religious institution that is lawful in one state may come under close scrutiny or even be challenged as unconstitutional in another.

In the pages that follow is a guidebook to help public charter school leaders—and the advocates, attorneys, and others who support them—navigate the increasingly complicated legal landscape surrounding public charter school use of a facility owned or operated by a

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religious organization. The National Alliance for Public Charter Schools is committed to working with the charter school community to develop capacity at the state level to sustain quality charter school growth. By presenting an analysis of the legal standards that govern application of the Establishment Clause and offering practical advice on how to ensure compliance with the it when a public charter school decides to locate in a religious-owned facility, this guidebook will help charter school leaders protect their access to an important facilities option and foster continued public charter school growth.

The guidebook is organized in three sections and contains specific tools intended for use by charter school leaders, state charter organizations, and public policy advocates and attorneys.

SECTION I contains a brief introductory discussion on public charter school expansion and the need to protect access to facilities to ensure continued charter school growth and quality. This section is intended to help public charter school advocates, statewide charter organizations, and charter school leaders make the case to lawmakers, authorizers, and others that charter schools need to preserve their ability to access facilities owned or operated by religious organizations.

■ **Guidebook Tool.** This section also includes a short overview of research on public charter school access to facilities and facilities funding. This information serves as important background for those unfamiliar with the persistent, institutionalized inequity in access to public school buildings and facilities funding between public charter schools and their traditional public school peers.

SECTION II is primarily aimed at helping public charter school attorneys understand the evolving legal landscape and to analyze the specific laws that will govern a charter school leader's actions with regard to any decision to use a facility owned or operated by a religious organization. Section II provides (1) a brief explanation of the Establishment Clause as it has been applied to decisions by public schools, (2) the applicable standards and legal principles that govern

public school use of religious facilities, and (3) a legal analysis of the Seventh Circuit decision in *Elmbrook* and its impact on the landscape.

■ **Guidebook Tool.** The *Elmbrook* analysis includes a summary graphic of the new standards that have arguably been created by the decision and that may be applied in the public school context to raise questions about the permissibility of certain affiliations with religious organizations.

SECTION III sets forth a practical guide to public charter school use of a facility that is owned or operated by a religious organization. This section is intended for use by public charter school leaders, operators and those who are charged with facilities operations, and those who advise charter school professionals and board members regarding decisions about facilities. It identifies the steps a school should take to ensure compliance with the Establishment Clause and still preserve the right to locate in a religious-owned or -operated facility.

■ **Guidebook Tool.** Appended to Section III is a set of sample lease provisions designed to help public charter schools avoid creating unwanted issues relating to the Establishment Clause when entering into a lease transaction with a religious organization for use of facilities.

No single guidebook can guarantee elimination of all legal risks associated with a public charter school's decision to use a religious organization's facility. However, in the following pages, we seek to identify and address the legal issues associated with concerns that by deciding to locate in a building owned or operated by a religious organization, a public charter school has formed an affiliation that violates the First Amendment Establishment Clause of the U.S. Constitution. Thoughtful consideration of these issues, coupled with due care to address them directly when a public charter school decides to locate in a religious-owned or -operated facility, should help substantially mitigate any legal risks.

¹ Doe ex rel. Doe v. Elmbrook School Dist., 687 F.3d 840 (7th Cir. 2012) (cert denied), 134 S. Ct. 2283 (June 16, 2014) .

SECTION I

Introduction

PRIMARY AUDIENCE

- Public charter school advocates
- Public charter school leaders
- Statewide public charter school organizations

KEY POINTS

- To keep pace with high demand for more public charter school seats, public charter school leaders need to address lack of access to facilities available for public charter school use
- Current supply of facilities is inadequate in a system where public charter schools have unequal access to public school buildings and facilities funding
- It is critical that public charter school leaders preserve their ability to open and operate schools in buildings owned or operated by religious organizations

GUIDEBOOK TOOL

- Overview of research on charter school access to facilities and facilities funding



SECTION I Introduction

Keeping Pace with Demand for More Public Charter School Seats

The National Alliance for Public Charter Schools (the “National Alliance”) and other public charter school advocates have been working to grow the number of high-quality public charter schools available to all families—especially those who do not have access to high-quality public schools. Policymakers understand the benefits of a strong, healthy public charter school movement, and in recent years we have seen unprecedented investments in public charter schools and very rapid growth.¹

Since the opening of the first public charter school in 1992, the number of public school students served by charter schools has grown steadily. Today, 42 states and Washington, D.C., have laws allowing the creation of public charter schools, and 6,400 charter schools serve a little over 2.5 million students around the country.² All of this growth has been fueled by the hard work and support of educators, philanthropists, policymakers, and families across the country.

Despite the tremendous growth, demand for public charter school seats continues to be very high and grows annually. In 2009, the National Alliance reported that nationally, more than 350,000 students were on waiting lists for public charter schools, with an estimated average of more than 238 students per public charter school nationwide. A recent report estimates that there are now more than 1 million student names on public charter school wait lists across the country.³ The demand for seats in public charter school persists at least in part because many states limit the supply by placing a cap on the total number of charter schools that can be established. The charter laws in almost half of the states operating public charter schools (19 of 43) include caps that limit public charter school expansion.⁴ However, public charter school caps are neither the only threat nor the biggest obstacle to charter school expansion. The lack of facilities available for public charter school use poses a significant threat to continued charter school growth as well.

A Threat to Public Charter School Expansion: Lack of Access to Facilities and Facilities Funding

When a new public charter school opens, school leaders frequently must find their own school building or facility. The entity that approves the establishment of the public charter school, the authorizer, does not typically provide the charter school a facility and, in many instances, neither the state nor local government provides additional funding to the public charter school to cover its facilities costs.⁵ (See Background



Note: Unequal Public Charter School Access to Facilities Funding.) A small number of state and local laws require districts to offer their unused facilities to public charter schools or share public school facilities equally between charter and traditional public schools.⁶ However, even when policymakers provide that option to public charter schools, many charter school leaders have had to resort to court action to compel districts to enforce those laws or even recognize them.⁷ In other states, public charter schools have initiated litigation to gain access to capital and facilities funds that are provided to traditional public schools.⁸ Thus, while there have been legislative efforts to mandate the provision of facilities or facilities funding to public charter schools in some states, in most states, charter schools’ access to public school facilities and facilities support is far from equal.⁹

The unequal access to public school facilities and to facilities funding creates a persistent need for public charter school leaders to identify other sources for facilities. Although the supply of facilities and funding to support demand for public charter schools may have been sufficient in the past, that is no longer the case. In a 2010 survey of charter management organizations (CMOs) conducted by the National Charter School Research Project, some 89 percent of respondents listed scarcity of facilities as the number one external barrier to the growth of CMOs.¹⁰ CMOs comprise a significant portion of the public charter school population. The call for greater access to facilities by CMO leaders serves as a strong indicator that charter school leaders of all types may be unable to meet the growing demand for public charter school seats if they cannot find suitable facilities.

Combating the Threat: Preserve Access to Alternative Facilities

Despite the significant obstacle to growth that inequitable access to facilities and facilities funding poses, public charter school leaders remain committed to the goal of creating more charter schools and ensuring that any student who wants a seat in a high-quality public charter school can find

one. Given the lack of access to public school buildings, public charter school leaders have typically located their schools in facilities of all types—including facilities owned or operated by religious organizations.¹¹

In the early years of the public charter school movement, many new charter schools opened in church facilities before moving to more traditional school buildings. These facilities can provide a convenient, low-cost alternative to a traditional district-owned school building, a market-rate commercial facility, or construction of a new building altogether. Now it is fairly common for public charter school leaders to report holding classes in former Catholic or other religious school buildings that were being underutilized or unused. Public

charter schools also frequently lease facilities located on church property or on a campus owned or operated by a religious organization. Unless there is a significant change in policy regarding public charter school access to district facilities and facilities funding, to satisfy the demand for charter school growth in the coming years, charter school leaders will need to preserve their ability to locate public charter schools on low-cost, alternative sites, such as many religious-owned properties. To accomplish this goal, public charter school leaders, advocates, and their lawyers must develop an understanding of what is required to ensure that a public charter school's decision to locate at a religious-owned or -operated facility will withstand scrutiny in a rapidly evolving legal landscape.

BACKGROUND NOTE: UNEQUAL PUBLIC CHARTER SCHOOL ACCESS TO FACILITIES FUNDING

Public charter schools not only lack access to facilities, they are also on unequal footing with their traditional public school counterparts when it comes to facilities funding. Like unequal access to facilities, the disparity in access to facilities funding is persistent and affects the potential for public charter school growth.

Only 13 states and Washington, D.C., have current laws that provide public charter schools with facilities funding.¹² This reflects a decline from 2011, when two additional states provided public charter schools with access to facilities funding.¹³ Accordingly, public charter schools are forced to spend a greater portion of their budget on facilities. In fact, public charter schools spend, on average, 13 percent of their operating budget on facilities.¹⁴ Thus, while traditional public district schools do not carry individual, school-level responsibility for locating and financing facilities,¹⁵ most public charter schools have to pay the extra costs of constructing, financing, leasing, and maintaining school facilities. Often this prevents public charter school leaders from making other investments.¹⁶

Most public charter schools carry the burden of paying additional costs for facilities, even though, as a general matter, public charter schools do not receive basic funding at the same level as traditional public schools. The first

comprehensive study of public charter school funding revealed that the “average per-pupil charter funding as a percentage of school district funding was approximately 80 percent.”¹⁷ The most recent study published by researchers at the University of Arkansas in 2014 reveals that the funding gap between public charter schools and their traditional counterparts has actually grown. From 2003 to 2011, the funding disparity increased more than 54 percent between public district and charter schools.¹⁸ In fact, the funding gap has reached 28.4 percent, which equates to \$3,814 less in per-pupil funding for the average public charter school student than is received for the average traditional public school student in the United States.¹⁹ Notably, the funding disparities are generally worse in urban areas.²⁰

The roots of the persistent district-to-public charter school funding inequity are structural, according to the authors of the University of Arkansas study. While charter laws give public charter schools access to general state education funding, no current state charter law provides public charter schools equal access to federal, local, and facilities funding.²¹ Embedded into the funding disparities are a lack of public charter school access to facilities and a lack of access to a consistent and reliable source of facilities funding.²² The 2014 University of Arkansas study confirms that the

absence of facilities funding from many state charter laws or regulatory schemes still contributes significantly to the overall funding disparity between public district and public charter schools.²³ “[F]acilities funding for charters is a critical issue, and lack of access to facilities funding is a critical element of the annual charter funding disparity that exists in the states. Understanding the level of access and the annual allocations for new facility projects is important to charter advocacy, funding, and financial stability.”²⁴ Time and again, studies have shown how the inability to access facilities at a reasonable cost continues to be a significant problem for public charter school leaders. Authors of both the 2005 and 2010 public charter school funding studies highlighted the lack of access to facilities and facilities funding as a major cause for concern and primary driver of the funding disparity between public charter schools and district schools.²⁵ The Fordham Institute report revealed that “[s]ince most facilities funding for K-12 schooling is locally provided, the lack of access to local funds [for charters] turns out to be the chief reason why charter schools are typically underfunded.”²⁶ The authors of the 2010 Ball State report confirmed that the “chief culprit” to blame for the wide funding disparities “was charter schools’ lack of access to local and *capital funding* (emphasis added).”²⁷

SECTION II

Preserving Public Charter School Access to Religious-Owned or -Operated Facilities

PRIMARY AUDIENCE

- Public charter school attorneys who can use overview of Establishment Clause and analysis of law on public school use of religious facilities

KEY POINTS

- Courts will first interpret the Establishment Clause, then apply legal precedent, and then make a fact-based determination to evaluate whether a decision to locate in a religious facility is constitutional
- In Illinois, Indiana, and Wisconsin, new standards announced in *Elmbrook* are almost certain to apply
- Message to charter lawyers: Advise clients of the legal issues and risks associated with use of a religious-owned or -operated facility

GUIDEBOOK TOOL

- A user-friendly graphic summarizing the new standards created by the *Elmbrook* decision



SECTION II Preserving Public Charter School Access to Religious-Owned or -Operated Facilities

A review of relevant court cases suggests that the law governing public charter school access to religious-owned property is changing. Recent rulings from the U.S. Supreme Court and lower courts interpreting the Establishment Clause of the First Amendment to the Constitution in the school context complicate the landscape for public charter school leaders facing the choice of whether to locate their schools in facilities owned by or associated with religious entities. A lease arrangement between a public charter school and a religious institution that is lawful in one state may come under close scrutiny or even be challenged as unconstitutional in another.

How Do Courts Decide Which Arrangements Are Legal? The Establishment Clause Explained

Public schools, whether traditional or charter, are generally considered government entities. Accordingly, like all government actors, they must comply with the Establishment Clause, which is part of the First Amendment to the U.S. Constitution. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The U.S. Supreme Court has interpreted this language in conjunction with the Fourteenth Amendment to impose specific limits on the power of state and local governments to adopt laws or regulations that involve religion, including school districts, their officials, and their employees.

The First Amendment Establishment Clause provides for the legal separation between church and state and requires neutrality in government action concerning religion. The Court explains that “[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another.”²⁸

For public schools, Establishment Clause concerns have been raised about prayer at school graduation, school board meetings, and other school events; art and other displays of religious symbols at school buildings; support for religious-themed student groups; use of public school buildings by religious organizations; and public school use of facilities owned by religious organizations.

Over time, courts have established various tests and considerations to determine whether a particular action taken by the government violates the principles of neutrality mandated by the Establishment Clause. The most well known of these tests is the three-part *Lemon* test, which was announced by the Supreme Court in *Lemon v. Kurtzman*.²⁹

Under the *Lemon* test, courts ask if a particular government action that involves religion: (1) reflects a clearly secular purpose, (2) has the primary effect of advancing or inhibiting religion, and (3) avoids excessive entanglement with religion.³⁰ The *Lemon* case involved a challenge to a Pennsylvania law that provided state-funded reimbursement to nonpublic schools, primarily Catholic schools, for certain teacher salaries.³¹ However, courts use the *Lemon* test extensively to address most claims raised under the Establishment Clause.

The widespread use of the *Lemon* test in cases involving the Establishment Clause has required courts to adapt the *Lemon* test when applying it to facts in particular cases. That adaptation has resulted in the development of alternative factors that courts use in addition to the *Lemon* test. In recent years, courts have begun to rely on what are commonly known as the endorsement and coercion tests. The endorsement test is essentially an outgrowth of the second prong of the *Lemon* test. The coercion test, in contrast, is not considered to be a part of the *Lemon* test. Although the extent to which failure to satisfy the coercion test can be an independent basis for an Establishment Clause violation is not always clear, courts often refer to the coercion test as part of their analysis. Thus, whenever the legality of schools’ actions under the Establishment Clause comes into question, courts will apply the basic principles of the *Lemon*, endorsement, and coercion tests to make their decisions.

Applicable Legal Test—Lemon Test and Its Progeny

Establishment Clause Tests	
Lemon Test	Coercion Test
Traditional Lemon Test Asks:	Does a particular government action that bears on religion <ul style="list-style-type: none">• reflect a clearly secular purpose,• advance or inhibit religion as its primary effect,• avoid excessive government entanglement with religion?
Endorsement Test Asks:	Does the challenged government practice have the effect of communicating a message of government endorsement or disapproval of religion?
Coercion Test Asks:	Does the action in question have the power to force an individual to give up certain rights or benefits as a price for not conforming to a religious practice endorsed or established by the state?

SECTION II Preserving Public Charter School Access to Religious-Owned or -Operated Facilities

Public School Use of Religious Facilities

To understand how the courts view public school use of religious facilities, it is helpful to first review the converse: how the law governs use of public school buildings by religious organizations and the placement or display of religious symbols in public schools. Although not completely settled, the law in this area is better developed than the law on public school use of religious facilities.³² A review of the case law offers two important lessons:

- Courts have cautioned school officials to avoid any appearance that the school supports or endorses the religious entity or the message of the religious organization that is using the school facility.
- Long-term arrangements that suggest a permanent relationship between a public school and a religious organization raise questions about whether there is an “excessive government entanglement with religion” that are difficult to answer. At least one court has required a school board to replace the multiyear lease it previously had offered its church/tenant in favor of a one-year lease subject to annual renewal. The court specifically expressed the concern that the long-term lease would run afoul of the Establishment Clause.³³

A less-developed, but growing, body of law involves the courts’ response to the question of whether the Establishment Clause permits public schools to use religious facilities for certain school activities—or, of more direct concern to charter advocates, to operate public charter schools. Courts vary widely in their application of the *Lemon* test to questions of whether school districts and student groups may hold certain events like graduations, plays, or student meetings in church buildings or sanctuaries. One federal court in Tennessee upheld a student group’s right to host their school’s Teens Against Alcohol and Tobacco Use program at a local church.³⁴ Another court concluded that a school did not violate the Establishment Clause by allowing the school choir to sing religious choral music in churches and other venues associated with a religious institution.³⁵ Yet other courts have struck down as unconstitutional a school district’s decision to hold a public school graduation ceremony in a local church.³⁶

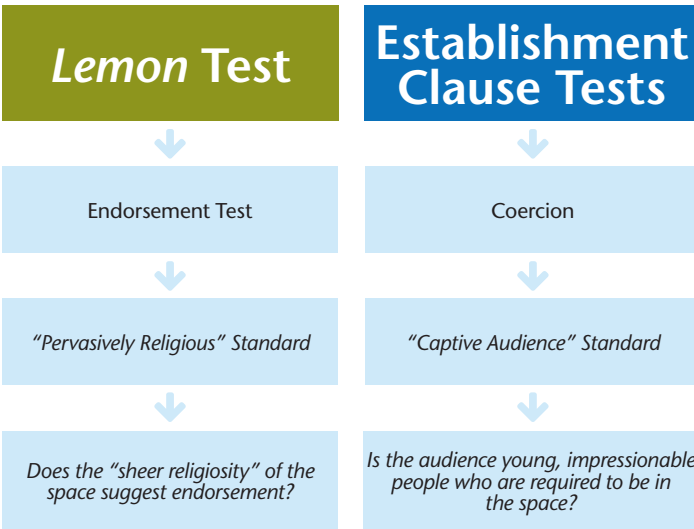
In one of these cases, *Doe ex rel. Doe v. Elmbrook School Dist.*,³⁷ the court adopted a particularly restrictive view of the Establishment Clause and the line between church and state. In *Elmbrook*, the graduation ceremony held at the local church did not contain any religious content. The religious messages or materials present at the building originated with the church and not the school or school district. Moreover,

it was undisputed that the district selected the church as the graduation venue for secular reasons. Notwithstanding these facts, the court concluded that the practice of holding the ceremony in a church violated the Establishment Clause.³⁸

The Seventh Circuit Court was particularly troubled by the presence of minors at the graduation ceremony, a “proselytizing environment” in the church, and the “sheer religiosity” of the space in light of the large Latin cross in the sanctuary, as well as pews and hallways that contained written religious materials and religious iconography in the building.³⁹ The court cast aside the school district’s stated secular reasons for choosing the space (students voted to hold graduation in a larger space at the church, and the space was less expensive than other offsite locations) and instead focused on the “pervasively religious environment” at the graduation. The court decided that the environment compelled the conclusion that the district endorsed the church’s religious message.⁴⁰ The court also applied the coercion test and concluded the school district violated the Establishment Clause in part because the students at the graduation ceremony were a “captive audience,” in that their attendance was not really voluntary.⁴¹

Critics of the *Elmbrook* decision argue that the court’s application of “pervasively religious” and “captive audience” standards unnecessarily expanded the reach of the Establishment Clause to invalidate school activity that included no actual government entanglement with religion. The graduation ceremony itself was devoid of references to religion or the church, and the students were not asked to participate in any religious activity or ceremony.⁴² Judges who disagreed with the *Elmbrook* ruling also contend that

New Standards Created by the *Elmbrook* Decision



a government entity's simple business transaction with a religious institution—a single day's rental of space for a special event—cannot form the basis of a finding that the government endorses the beliefs of the religious property owner.⁴³ They argue the court completely ignored the secular purpose of the school district's actions to unjustifiably infer endorsement of religion. In addition, they contend the Court falsely equated the coercive pressure generated by engagement in actual religious activity with the possible impact of incidental exposure to religious symbols and iconography that students may have experienced at graduation.⁴⁴

The Supreme Court recently decided to allow the Seventh Circuit's decision in *Elmbrook* to stand and denied the school district's request to appeal the case to the high court.⁴⁵ If the reasoning of the Seventh Circuit is followed by other courts, without due regard to the specific facts in that case, the *Elmbrook* decision could significantly limit school officials' ability to use religious facilities in the future. One of the judges on the *Elmbrook* court who disagreed with the majority opinion foretold of the problems that the decision would pose for educators in Illinois, Indiana, and Wisconsin bound by the law of the precedent-setting case. Judge Ripple wrote:

The tremors of this decision will no doubt be felt in the area of education. After today's decision, it is difficult to see how any religious sign or symbol associated with a "pervasively religious" institution could be allowed even to cast a shadow on a public educational institution, or on an event sponsored by such an institution. Although we must await further cases to know for certain how the court will treat these situations, the doctrinal and methodological foundation has been laid for a fresh look at many current governmental practices. . . . Will public high school athletic teams be permitted to enter "pervasively religious" schools for interscholastic academic or athletic activities? Assuming that such interscholastic events are allowed to continue, will the students from Christian schools be asked to refrain from raising their banners that contain a school coat of arms with the cross predominately displayed or will they have to refrain from doing so in order not to "coerce" their public school opponents? Will the basketball or track team of such schools be permitted to wear athletic uniforms with such a pervasively religious symbol in plain sight? What principled distinction does the court suggest to ensure that the approach it establishes in this case will not spread its dominion to these situations?

After all, graduations are not the only momentous events in the civil life of a community, and the mere presence of "pervasively religious" symbols in such a setting now must be considered as a coercive endorsement by the state.⁴⁶

Although public charter school use of church facilities is not mentioned by name in the litany of questions raised by Judge Ripple, another judge on the court explicitly questions the legal viability of a public school district's long-term rental of church space to operate a school. Even Judge Posner, a critic of the *Elmbrook* decision, suggests that under the *Elmbrook* standards, for a district to close its buildings and instead rent a church building to hold classes, "the appearance of endorsement would be inescapable."⁴⁷

Impact of *Elmbrook* Decision on Public Charter Schools

Now that the Supreme Court has decided not to disturb the Seventh Circuit's decision in *Elmbrook*, the case creates potentially vexing questions about the legality of public school use of religious-owned buildings across the nation.⁴⁸ Perhaps more concerning, it beckons litigants who want to see strict and widespread enforcement of the standards announced in *Elmbrook* to bring new cases to court in other states. Now more than ever, public charter school leaders need guidance on how to avoid unknowing violations of the Establishment Clause brought about simply because they choose to operate a school in a facility that is or once was affiliated with a religious entity.

SECTION III

Practical Guide to Public Charter Use of Facilities Affiliated with Religious Organizations

PRIMARY AUDIENCE

- Public charter school leaders
- Public charter school operators
- Public charter school facilities consultants

KEY POINTS

- There is no legal prohibition against location of a public charter school in a building owned or operated by a religious organization
- Decision to locate in a facility owned or operated by a religious organization should be guided by two main principles:
 1. The public charter school itself must be nonsectarian in mission and operations
 2. The religious organization/ landlord may not exercise any control over the school's academic program or operations
- Be sure to ask the right questions before you execute a contract to ensure it includes provisions consistent with the two principles

GUIDEBOOK TOOL

- Appendix with sample lease provisions
- Special considerations for public charter school authorizers



SECTION III Practical Guide to Public Charter School Use of Facility Affiliated with Religious Organization

Preparing to Access a Facility Owned or Operated by a Religious Organization—Ask the Right Questions

Notwithstanding the decision in *Elmbrook* and the complex questions it raises about the application of the Establishment Clause, there is no legal basis to call for an end to all use of religious-owned or -affiliated facilities by public charter schools. Even in the states where *Elmbrook* is now arguably the law of the land, courts have not announced a *per se* rule that prohibits public charter schools from entering into commercial transactions with religious organizations to purchase or lease a facility, rent space on a long- or short-term basis, or otherwise share a building.

The U.S. Department of Education (Department) has issued nonregulatory guidance that specifically confirms that it considers public charter school use of facilities owned or operated by religious organizations to be lawful. In its most recent guidance, the Department states: “A charter school may use the facilities of a religious organization to the same extent that other public schools may use these facilities. Generally, this means that a charter school may lease space from a religious organization so long as the charter school remains non-religious in all respects, including its programs, operations, and physical environment. Most importantly, a landlord affiliated with a religion may not exercise any control over what is taught or displayed in the charter school.”⁴⁹ Thus, no federal statute or rule exists that would create an express prohibition on public charter school use of religious-owned or -operated facilities.

Accordingly, public charter schools are free to enter into an agreement with a religious organization for the use of a facility. Before doing so, however, the school operator should answer several key questions and prepare the appropriate legal documentation with those answers in mind. The answers to these key questions will depend on the specific facts of the potential arrangement and the law in the state where the public charter school is located.

The degree of legal risk associated with use of a religious-owned or -operated facility depends in part on whether your school is located in a state that sees any affiliation between a public school or district and a religious organization as a potential Establishment Clause violation, or in a state that applies the traditional *Lemon* test. This will depend at least in part on how the courts in a particular state decide to interpret cases like *Elmbrook* and others that involve public schools and application of the Establishment Clause. Ultimately, however, the key to protecting the school’s ability to use a religious-owned or -operated facility is to establish a relationship with

the religious organization that, to the extent possible, features the components of a typical landlord/tenant, lessor/lessee, or other ordinary, commercial relationship.

Below, we review three different ways public charter schools tend to use a religious-owned or -operated facility:

1. Public charter school lease/sublease of an entire building or partial space/classrooms in a facility owned or operated by a religious organization or co-locating with a religious organization
2. Public charter school temporary use or rental of a religious-owned or -operated facility for a specific event or programming
3. Public charter school purchase of a facility from a religious organization

By asking the questions a reviewing court may use to evaluate the lawfulness of a school’s use or purchase of a facility owned by a religious organization, we offer specific steps a public charter school should consider taking to create what courts will view as a permissible, arm’s-length commercial relationship with the religious organization. Further, in the appendix, you will find sample lease provisions designed to help public charter schools avoid creating Establishment Clause issues when entering into agreements with religious organizations for the use of facilities (*Appendix A*).

Public Charter School Lease/Sublease of Building Owned or Operated by Religious Organization

Is the school’s facility choice driven by a secular purpose?

The first question a public charter school seeking to lease from a religious organization must be able answer is: Why has it chosen the building; or put another way, is its choice influenced by the religious affiliation of the proposed landlord? To clear the first hurdle of the *Lemon* test, the school must be able to state unequivocally that it has selected the building for reasons not associated with the landlord’s status as a religious organization.

Some courts may accept a school’s certified statement that its facility selection is not motivated by religion as proof of its secular intent. However, other courts may want to consider the public charter school’s educational program, as well as the school’s willingness to provide a certified statement before it will conclude that the school’s facility choice is driven by a secular purpose. Furthermore, the process a school uses to find space and the criteria it uses to assess

SECTION III Practical Guide to Public Charter School Use of Facility Affiliated with Religious Organization



it also matter. For instance, if a school has the capacity to engage in a competitive selection process by conducting a Request for Proposals (RFP) or to hire a realtor or broker to locate space, it will be in a better position to demonstrate that it seriously considered other, nonreligious spaces. Additionally, the school should be able to present secular, preferably commercial-based, reasons for its choice of a religious-owned or -operated building. Examples of such commercial-based justifications include:

- Lack of adequate classroom space in publicly owned or other available facilities
- The religious-owned or -operated space is least-expensive, most efficient alternative
- No other suitable facility available within the community that the school is designed to/obligated to serve under its charter
- No other facility contains same or similar amenities

Does the relationship between the school and the religious organization suggest public school endorsement of religion?

After a school asserts its secular purpose for locating in a facility owned or operated by a religious organization, it next needs to demonstrate that the actual business relationship developed is commercial. A court will look to various aspects of the legal relationship between the school and the religious organization to better understand whether the secular purpose asserted by the school is borne out by the parties' conduct.

Is this a typical lease? The legal terms of any lease or other contract that governs the school's use of the facility should

contain standard leasing terms that would be typical for a lease of the scale and type at issue. In addition, to the extent possible, the lease should not contain any material terms that suggest the school is paying substantially less than fair market value for rent. Likewise, the lease should not contain terms that indicate the school is receiving extraordinary favorable treatment or other benefits under the lease that would not be offered to other similarly situated commercial tenants/lessees.

If the religious organization is willing to offer a school a discounted rental rate, the school should include language in the resulting lease where the parties acknowledge that the religious

organization would have offered the discounted rental rate to any school and that neither the public charter school nor any of its employees or students are obligated to adopt any religious tenets or beliefs as a condition of the lease. Finally, the lease should not give the religious organization landlord the ability to influence or interfere with the educational program at the school.

Is this a typical landlord/tenant relationship? In addition to looking at the lease itself, courts will examine the nature of the parties and their relationship to one another. If there are any ties between the governing board or staff of the school and the board or staff of the religious organization, those relationships can raise concerns. For example, if the board president of the public charter school is also a pastor of the church where the school is going to be located, the pastor's dual role as church representative and public charter school board chair may create a perception of substantive entanglement between the school and the church. That type of entanglement will raise questions about the extent to which the landlord/tenant relationship reflects a typical, arm's-length commercial arrangement.

A religious organization's experience as a landlord also may become a factor. If the religious organization has a history of leasing space to schools and other organizations, courts are more likely to view the organization as a business enterprise that raises revenue by leasing its unused space to tenants. However, a decision by a religious organization without such a track record to lease its facility to a public charter school is more likely to be seen as an extension of its organizational mission, and the terms of the lease will be scrutinized more closely.

Furthermore, although it may benefit the educational program of the public charter school to lease from an organization with a similar philosophy or mission, that benefit may become a liability when it comes to Establishment Clause analysis. Pursuit of a shared mission blurs the line between the school and the religious organization. Therefore, the public charter school should take steps to differentiate the religious organization's mission from its own, even though there may be natural similarities (e.g., schools with a character education mission or a disciplinary code that includes features similar to those found in religious texts).

Finally, if the school and the religious organization landlord have shared programming or hold joint events, those activities also will raise concerns about the school's endorsement of the religious organization's mission and beliefs. Such joint activity may contribute to a public perception that the school endorses the mission of the religious organization or that the organizations share the same mission. Accordingly, such joint activities should be avoided.

Does the building contain features that contribute to a pervasively religious environment?

After a court looks to the lease and examines the relationship between the school and the religious organization, it will look to the facility itself. If the facility contains indicia of a religious organization, the likelihood that a court will consider the environment pervasively religious increases significantly. Taking steps to ensure that any facility to be utilized by a public charter school for educational purposes is free of religious symbols, literature, or other materials is a necessary but not sufficient condition for compliance. Although removal of all religious symbols and insignia is no guarantee that a court will find the public charter school's use of the space constitutional, the presence of those items in a school building where students and school personnel interact regularly creates a strong likelihood a court will find an Establishment Clause violation.

Before selecting a facility that is owned or operated by a religious organization, a public charter school should inspect all areas and talk with the landowner to ensure the following steps can be taken to reduce the risk of an Establishment Clause violation:

- The school has a separate entrance from any other tenants or inhabitants of the facility.
- The entire facility is free from any signage that refers to the religious organization or any affiliation with the religious organization.

- If there is any signage that refers to the religious organization or any affiliation with the religious organization, it is located apart from the school's signage so as to appear separate and distinct.
- If there is any signage that refers to the religious organization or any affiliation with the religious organization and it is not located apart from the school's signage, the religious organization signage is covered during school hours.
- The facility does not contain any religious symbols visible to those attending and working in the school during school hours.
- Any religious symbols that cannot be removed can be covered or otherwise hidden from view during school hours.
- Any religious symbols that cannot be removed, covered, or otherwise hidden have received official status as a relic of architectural or historical preservation or art.
- The facility does not make religious texts or written materials readily accessible to students in any space used or inhabited by the school.

Does the relationship create a coercive environment for students and families who attend?

Not every court will apply the coercion test strictly or in the manner the court did in the *Elmbrook* case. However, most courts will consider whether the school's location forces students to be educated in an environment that is overtly religious. The risk that a court will consider a religious-owned building coercive is increased where the students are preschool- or elementary school-aged children. That risk also increases when the parties' shared use of the facility means students will come in contact with the owners, personnel, parishioners, or guests of the religious organization. If the school will be sharing any spaces with the religious entity, such as the auditorium, office space, parking lots, or other outdoor spaces, a court may find that environment impermissibly coercive for young, impressionable students.

To avoid creating such an environment, when leasing an entire facility, a school should avoid entering into an agreement that would require it to share space at the facility with a religious organization. When leasing partial space within a facility or certain classrooms, the parties should ensure the space is not shared during school hours and does not contain any sign of use by the religious organization on during school hours. The lease agreement should include express provisions that restrict the religious organization's use of shared spaces to nonschool days and outside of school hours and that minimize student exposure to religious organization personnel.

SECTION III Practical Guide to Public Charter School Use of Facility Affiliated with Religious Organization

Students are a captive audience, so how can you demonstrate students have enrolled voluntarily?

Public charter school students who attend a school located in a building owned or operated by a religious organization are technically “captive” to receive any messages delivered in the school. Unlike the students who attended graduation at a local church in the *Elmbrook* case, public charter school students in religious-owned facilities come to the building every day, remain inside several hours per day, and, once enrolled, are compelled to attend most days of the year. If a court were to adopt and strictly construe the coercion test to include the captive-audience factor, a public charter school’s decision to locate in a facility with any indicia of religion would likely be found to violate the Establishment Clause.

To reduce the risk of such a finding, in addition to removal of any religious symbols from the building, the school should ensure it maintains an open enrollment process and no student is forced to attend the public charter school. Additionally, the school should adopt and enforce policies that demonstrate tolerance and accommodations for all students, regardless of their religious affiliation or nonaffiliation with religion. Explicit statements of nondiscrimination and religious accommodation should be placed prominently on recruiting materials, public charter applications, and admissions and enrollment materials. Moreover, school policies, such as those that govern birthday celebrations and holidays, should be developed in a manner

that considers the religious beliefs and perspectives of the entire community. Consistent adherence to these policies can help a public charter school demonstrate that all of its students attend the public charter school voluntarily and are not influenced to do so by the school’s relationship with a religious organization or its location in a religious-owned or -operated facility.

Public Charter School Temporary Use of Space Owned or Operated by Religious Organization

Is the school’s facility choice driven by a secular purpose?

When a public charter school decides to use a religious-owned or -operated facility to hold a school event or limited programming, a court will ask the same fundamental question about that choice as it does when a school chooses to locate in a religious facility permanently. Can the school demonstrate that it selected the site for reasons not associated with the property owner’s status as a religious organization? The more closely the selection process resembles any other commercial decision the school must make, the more likely a court will conclude that the public charter school’s choice was driven by a secular purpose.

Accordingly, before a school decides to use a religious organization’s facility for graduation or other school event or programming, it should do the following:

- Engage in a competitive selection process.
- Research and compare alternative sites.
- Consider utilizing a third party to identify sites and provide advice regarding selection of an appropriate site.

Does the relationship suggest public school endorsement of religion?

Again, the same questions that drive a court’s analysis when a school chooses to locate in a religious facility permanently will be considered when a public charter school decides to use a religious-owned or -operated facility to hold a school event or limited programming. A court will ask: (1) Does the agreement that establishes the terms governing the facility’s use contain typical terms, given the contemplated event or programming and planned use? (2) What is the relationship between the school and the organization allowing use of the facility? (3) Are there any relationships that are not arm’s-length or that point to an affiliation between the school and the religious organization beyond the contemplated deal to use the facility? (See above analysis for Public Charter School



Lease/Sublease of Building Owned or Operated by Religious Organization for a more detailed discussion.)

Does the building contain features that contribute to a pervasively religious environment during usage?

Four key elements must be considered—the facility entrance, the religious signage, the religious symbols, and the religious literature. When a public charter school arranges to use a religious facility on a temporary basis, it may be more difficult to convince the property owner to provide the school with an entrance that is separate and distinct from the religious organization. In addition, the property owner may be less willing to remove or conceal all signage that belongs to the religious organization. Nonetheless, the school should attempt to negotiate these terms as conditions of the space rental and should anticipate that a religious organization may ask the school to cover any additional cost associated with making these accommodations.

The removal of religious symbols and literature from the religious facility during the public charter school's use of the space is even more critical than a separate entrance or removal of signage. These are nonnegotiable. As a condition of the rental agreement, the public charter school should ensure the religious organization removes or conceals all religious symbols in the spaces the public charter school expects to use. In addition, the religious organization should remove any literature or other written materials from the rented spaces.

Does the relationship create a coercive environment for students and families who attend?

In addition to considering how to reduce students' exposure to a pervasively religious environment by securing a separate entrance and removing or avoiding religious signage, symbols, and literature, a public charter school that plans to use a religious facility temporarily also must take steps to reduce the risk that students will share the facility at a time that would put them in sustained contact with the owners, personnel, parishioners, or guests of the religious organization. As discussed in more detail in the analysis for the previous section, Public Charter School Lease/Sublease of Building Owned or Operated by Religious Organization, although not every court will apply the coercion test strictly, many courts do look at the coercive impact of overtly religious symbols, materials, and communication on students, particularly preschool- or elementary school-aged children. To the extent possible, the school should seek to use the space when it is not in use by the religious organization.

Does the proposed use of the facility make students a captive audience?

The type of event or programming a school wants to conduct in a religious-owned facility is a critical factor the court will consider when determining whether students are a captive audience and if the environment is necessarily coercive. If the activity or event is mandatory for students to attend and the facility contains religious symbols or written materials, the environment will almost certainly be considered coercive. However, if a school can demonstrate student participation in the event at the site is voluntary and short term, the likelihood of such a finding is diminished. Accordingly, to the extent possible, a public charter school should reserve the temporary use of a religious-owned facility for events and programming that involve extracurricular or co-curricular activities and voluntary participation. If the school decides to use a religious organization's facility for an event like graduation, orientation, or an important meeting or training, it should offer students and families who would like to opt out an alternative way to participate without having to enter the religious facility.

Public Charter School Purchase of a Facility Owned or Operated by Religious Organization

Is the school's purchase driven by a secular purpose?

When a public charter school purchases a facility from a religious organization, the questions a court will ask about the transaction once again focus on whether the deal is a typical, commercial transaction motivated by market-based considerations or if the sale reflects a religious purpose. The transaction is more likely to be considered an arm's-length commercial sale if it features the following:

- Fair market price for the facility
- Competitive RFP process or brokered search
- Negotiation of sale by broker or agent of the public charter school
- Material terms of the deal typical for a building of similar size and type

Does the relationship between the school and the religious organization suggest public charter school endorsement of religion?

A court also will want to know the transfer of the facility to the public charter school reflects an actual purchase by the school and not a gift or other type of property transfer that might be similar to a gift. To confirm the commercial

SECTION III Practical Guide to Public Charter School Use of Facility Affiliated with Religious Organization

NOTE: CONSIDERATIONS FOR PUBLIC CHARTER SCHOOL AUTHORIZERS

Public charter school operators who locate in buildings owned or operated by religious organizations must take affirmative steps to protect their schools against charges alleging the landlord/tenant relationship violates the Establishment Clause. As such, it is appropriate for authorizers to question whether there is a role for public charter school authorizers to play in policing the relationships between public charter schools and religious organizations that provide facilities. Moreover, an authorizer might wonder if any legal risks are created when it takes steps to prevent a public charter school from violating the Establishment Clause.

A review of existing law suggests authorizers who regulate public charter schools that lease or purchase facilities and space from religious organizations

may themselves risk violating the constitutional right to free exercise of religion and equal protection guaranteed to the religious organizations. In some cases, the decision by a school district or other government entity to treat a religious organization differently than other groups due to an Establishment Clause concern itself has amounted to a constitutional violation.

To protect itself from risk, a public charter school authorizer may want to consider the following questions:

- Do the federal Constitution and/or applicable state constitution allow an authorizer to condition public charter school approval upon the school's promise to locate in a facility that is not affiliated with a religious organization?
- May an authorizer place additional compliance requirements on a public charter school that has decided to locate in a building owned and co-located by a religious organization?
- Is it constitutional for an authorizer to refuse to approve and fund a public charter school that is housed in a facility that also is home to a local church for fear that the authorizer will be deemed to endorse the church's religious views?
- Should an authorizer require public charter schools that locate in a facility owned or operated by a religious organization to include specific provisions in the lease or license agreement to protect against Establishment Clause claims?

nature of the transaction, a court will examine the sales documentation, the nature of the parties, and their relationship to one another. Thus, any preexisting relationship between the governing board or staff of the school and the board or staff of the religious organization may raise questions about the arm's-length nature of the deal. Similarly, if a public charter school purchases a facility from a religious organization with a religious mission that aligns closely with the mission of the school, a court may scrutinize that relationship and any sale of property between the two entities more closely.

In addition, as with typical commercial sales, the public charter school's relationship with a religious organization seller should end after the sale of the facility is complete. If any noncommercial aspect of the relationship between the school and the religious organization extends beyond the sale (e.g., individuals affiliated with the seller become public charter school board members or employees), it may contribute to a public perception that the entities are related, that the school endorses the mission of the religious organization, or that the organizations share the same mission. If any of these perceptions are generated by the sale, a court is likely to have concerns that the transaction violates the Establishment Clause.

Does the building contain features that contribute to a pervasively religious environment?

Once the purchase of a building from a religious organization is complete, the public charter school has an obligation to

ensure any religious symbols, insignia, literature, or other written materials are removed or, at minimum, concealed before the facility is operated as a school. Therefore, it is critical to negotiate who will bear the cost of removal and/or concealment of all indicia of the religious organization's prior ownership. Before the closing, the public charter school should consider the following:

- Are any of the changes to the facility the public charter school expects to make disallowed due to architectural or historical preservation laws, rules, or policies?
- How long will it take to obtain any special permits, variances, or allowances required to make necessary modifications to the facility, and which party will bear the cost of obtaining them?
- Do any of the religious symbols attached to the facility have any financial value that might impact the sales price or overall property value?
- Who will own the rights to any valuable religious symbols after the purchase of the property?
- Can a final inspection be scheduled to ensure the religious organization has complied with all obligations to remove and/or conceal religious symbols and materials?

Taking these steps should further insulate a public charter school from charges that its purchase of a facility from a religious organization violates the Establishment Clause.

CONCLUSION

For public charter school leaders, access to facilities continues to be one of the most significant barriers to growing and opening more public charter schools. It also contributes greatly to the funding gap between public charter schools and other public schools. Unless and until public charter schools obtain equal access to public school buildings, public charter school leaders will have to find alternative sources of low-cost facilities suitable for locating public charter school classrooms. For years, public charter school leaders have met that need in part by using buildings owned and operated by religious organizations. Rarely, however, did the resulting lease or sale transactions raise concerns about public school affiliation with a religious organization or endorsement of religion. However, increasingly today, it appears that a public charter school decision, for example, to move into a former Catholic school building or co-locate on property owned by a church in the community is much more likely to be scrutinized for signs that the decision somehow violates the Establishment Clause or otherwise crosses the constitutional line between church and state.

A search of the Internet for recent media reports on the topic reveals organizations formed exclusively for the purpose of monitoring actions taken by public schools and other government entities that result in an affiliation with a religious organization. For these groups, an action such as in the examples above may be deemed sufficient to warrant investigation or legal challenge. Yet even as the legal landscape changes, public charter school leaders and their supporters can take steps to lessen the risk that a public charter school will become the target of such unwanted attention.

First, in all events, for public charter school leaders: ensure that the school's facility decision is guided by considerations that are commercial in nature and, to the extent possible, make sure any resulting agreement is executed as a typical business transaction would be. Second, for public charter school attorneys: be mindful that any advice you provide to the public charter school should consider (1) the specific law of the state in which the school is located, (2) whether the state has adopted any of the standards announced in *Elmbrook*, and (3) the school's planned use for the facility. Third, for public charter school advocates and school leaders: there is no law or regulation that forbids public charter school use of religious-owned or -operated buildings. With thoughtful guidance and counsel, public charter school leaders can continue to use religious-owned and -operated buildings as valuable sources of school facilities to help them satisfy the substantial demand for public charter school seats.

ENDNOTES

- 1 National Alliance for Public Charter Schools, Fulfilling the Compact: Building a Breakthrough, Results-Driven Public Charter School Sector (Washington, DC: National Alliance for Public Charter Schools, June 2012), 7.
- 2 National Alliance for Public Charter Schools, Back to School Tallies: Estimated Number of Public Charter Schools & Students (Washington, DC: National Alliance for Public Charter Schools, 2012–2013) (January 2013).
- 3 National Alliance for Public Charter Schools, A Growing Movement: America's Largest Charter School Communities: Eighth Annual Edition (Washington, DC: National Alliance for Public Charter Schools, December 2013), 2.
- 4 National Alliance for Public Charter Schools, Model Law Rankings Database (Washington, DC: National Alliance for Public Charter Schools, 2013). However, following the U.S. Department of Education's implementation of the Race to the Top grant competition, which gave priority to grant applications from states that encouraged public charter school growth, many states revised their laws to either lift existing public charter school caps or remove other barriers to public charter school growth. Between 2010 and 2013, some 16 different states amended their charter laws to lift charter caps and facilitate greater public charter school expansion. See National Alliance for Public Charter Schools, Assessing the Increasing Strength of Charter Laws Between 2010 and 2013 (Washington, DC: National Alliance for Public Charter Schools, August 2013) at 7.
- 5 Meagan Batdorff, Larry Maloney, Jay F. May, Sheree T. Speakman, Patrick J. Wolf, and Albert Cheng, Charter School Funding: Inequity Expands (Fayetteville, Arkansas, University of Arkansas, April 2014), 35.
- 6 National Alliance, Fulfilling the Compact, 10.
- 7 Public charter school operators in California and New York have consistently turned to the courts for enforcement of laws intended to provide charters with better access to district facilities. In California, public charter schools have brought challenges seeking enforcement of Proposition 39, which requires that facilities "be shared fairly among all public school pupils, including those in charter schools." See California School Boards Association v. State Board of Education, 191 Cal. App. 4th 530, 580–81 (2011) (upholding state regulations that govern provision of facilities to charter schools); New West Charter Middle School v. Los Angeles Unified School District, 187 Cal. App. 4th 831 (2010) (noting court order requiring district to share high school facilities with charter school); Sequoia Union High School Dist. v. Aurora Charter High School, 112 Cal. App. 4th 185, 197 (2003) (holding that state law required the district to provide facilities to the charter school). In New York, to enforce and, in some instances, to defend their right to co-locate or otherwise access district facilities under the New York State Charter Schools Act, Section 2853, public charter school operators have been forced to litigate. See Placencia, et al. v. Bd. of Education of the City School District of the City of New York, Case No. 14 CV 1830 (lawsuit brought by charter school students, parents, and Success Academy Charter Schools against the District to enforce its right to a co-location); New York City Parents Union, et al. v. The Bd. of Ed. of the City School District of the City of New York, Case No. 108538-11 (suit brought by parents of students in traditional public schools claiming injury from charter school co-locations); Steglich, et al. v. Bd. of Ed. of the City School Dist. of the City of New York and Success Academy Charter School, 929 N.Y.S.2d 686 (2011) (lawsuit against New York public schools chancellor to prevent proposed co-location of a charter school). See also Nelson Smith, "Whose Buildings Are They Anyway?," Education Next 12, no. 4 (2012): 3 (citing instances in Ohio and Washington, D.C., where lawmakers or public officials refused to recognize or implement laws that would have provided charter schools with greater access to district facilities). See also Environmental Charter High School v. Centinela Valley Union High School Dist., 122 Cal. App. 4th 139 (2004) (rejecting plaintiff charter school's claim that the law required the district to provide facilities, even though the charter submitted sufficient documentation with regard to projected enrollment).
- 8 See Sugar Creek Charter School v. North Carolina, 712 S.E.2d 730, 739 (2011) ("Although there are certainly similarities between the ends sought to be served by both traditional public schools and charter schools, the statutory provisions applicable to each type of educational institution differ widely and clearly indicate that the capital needs of traditional public schools and charter schools should be met in different ways. As a result, we conclude that Plaintiffs' request that we interpret the relevant statutory provisions to provide charter schools with access to local capital outlay funds lacks merit."); Scipio-Derrick v. Davy, 2 A.3d 387, 399 (2010) (rejecting plaintiffs' argument that state laws excluding charter schools from public school facilities violates their equal protection rights); Dolores Huerta Preparatory High v. Colorado State Bd. of Ed., 215 P.3d 1229, 1235–1236 (2009) (holding that state law did not require that charter schools receive any particular level or type of long-term facility support).
- 9 Batdorff et al., Inequity Expands, 35 ("charter access to facilities funding in many states is prohibited statutorily, and where access is granted, legislative line-item funding is inconsistent and unreliable. Per-pupil facilities funding or capital financing is inconsistent within states, and limited annual funding of facilities is damaging to both district and charter financial planning").
- 10 Smith, "Whose Buildings?," 1–2. See also Center on Reinventing Public Education, National Charter School Research Project, Charter Management Organizations: Innovations, Opportunities, and Challenges. Research Brief (Bothell, Washington, University of Washington Bothell, June 2010), 3.
- 11 "[C]harters can be found in church basements, strip malls, business parks, and old warehouses." See Charter School Facilities Initiative, Is the Quality of Charter School Facilities Related to Student Performance? (Washington, D.C., Colorado League of Charter Schools and National Alliance for Public Charter Schools, November 2013), 25.
- 12 Batdorff et al., Inequity Expands, 36.
- 13 Maria Sazon, Making Room for New Public Schools, How Innovative School Districts Are Learning to Share Public Education Facilities with Charter Schools (Washington, DC: National Alliance for Public Charter Schools, April 2011).
- 14 National Alliance for Public Charter Schools, Public Charter School Facilities: Results from the NAPCS National Charter School Survey, School Year 2011–2012 (Washington, DC: National Alliance for Public Charter Schools 2013), 3.
- 15 National Alliance, Fulfilling the Compact, 10.
- 16 Sazon, Making Room, 5.
- 17 National Alliance, Fulfilling the Compact, 10. See also Sheree Speakman and Bryan Hassel, Charter School Funding: Inequity's Next Frontier (Dayton, Ohio, Thomas B. Fordham Institute, August 2005) ("2005 Fordham Institute Report").
- 18 Batdorff et al., Inequity Expands, 13.
- 19 Ibid., 12. In 2010, in a follow up to the 2005 Fordham Institute report that reflected public charter school funding for schools serving more than 90 percent of the nation's public charter school population, researchers from Ball State University reported that "the average state disparity was 19.2 percent or \$2,247 per-pupil." National Alliance, Fulfilling the Compact, 7; Meagan Batdorff, Larry Maloney, and Jay F. May, Charter School Funding: Inequity Persists (Muncie, Indiana, Ball State University, May 2010).
- 20 Batdorff et al., Inequity Expands, 16.

- 21 *Ibid.*, 34–35.
- 22 *Ibid.*, 28; Batdorff et al., *Inequity Persists*, 1 (“no state provided charter schools equal access to all funding sources (federal, state, local and facilities)”).
- 23 Batdorff et al., *Inequity Expands*, 35.
- 24 *Ibid.*, 35.
- 25 2005 Fordham Institute Report, 3; Batdorff et al., *Inequity Persists*, 1.
- 26 2005 Fordham Institute Report, 3, VI (“At the Thomas B. Fordham Foundation, the charter-starvation strategy began to reveal itself several years ago in Dayton, Ohio. The Charter schools we were working with in that small city never seemed to have enough money to obtain the facilities...that many needed...Community leaders also pointed out that the two largest charters in town... could not have opened had local business leaders and philanthropists not come up with an off-budget way to pay for their buildings. [The operator]...was unable to make ends meet based on the per-pupil funding that Ohio channeled into its charter schools, not, at least, if that funding had to cover the expense of facilities, too”).
- 27 Batdorff et al., *Inequity Persists*, 1. National Alliance, *Fulfilling the Compact*, 10 (“In all but 15 states and the District of Columbia, however, charters must dip into even smaller pots of per-pupil funding to secure facilities before the funding of instruction can even begin”). See also, 2005 Fordham Institute Report, VI (“At the Thomas B. Fordham Foundation, the charter-starvation strategy began to reveal itself several years ago in Dayton, Ohio. The Charter schools we were working with in that small city never seemed to have enough money to obtain the facilities . . . that many needed. . . . Community leaders also pointed out that the two largest charters in town . . . could not have opened had local business leaders and philanthropists not come up with an off-budget way to pay for their buildings. [The operator] . . . was unable to make ends meet based on the per-pupil funding that Ohio channeled into its charter schools, not, at least, if that funding had to cover the expense of facilities, too”).
- 28 *Epperson v. Arkansas*, 393 U.S. 97, 103–104 (1968).
- 29 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
- 30 *Id.*
- 31 *Id.*
- 32 These cases involve the Free Exercise Clause of the First Amendment. So they often include application of the *Lemon* test as well as some discussion of the extent to which the organization petitioning to use the public school space as a forum for expression has rights to do so under the Free Exercise Clause of the Constitution.
- 33 *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994). This case demonstrates the complicated nature of the questions that arise regarding the wall between church and state when public schools and religious organizations enter into contractual relationships with one another.
- 34 *ACLU-TN v. Sumner County Bd. of Educ.*, 2011 WL 1675008, at *1–2 (M.D. Tenn. 2011).
- 35 *Bauchman for Bauchman v. West High School*, 132 F.3d 542, 554 (10th Cir. 1997).
- 36 *Doe ex rel. Doe v. Elmbrook School Dist.*, 687 F.3d 840 (7th Cir. 2012) (en banc)(cert denied), 134 S. Ct. 2283 (June 16, 2014); *Does v. Enfield Public Schools*, 716 F.Supp. 2d 172 (D. Conn. 2010).
- 37 *Elmbrook*, 687 F.3d at 840.
- 38 *Elmbrook*, 687 F.3d at 850.
- 39 *Id.* at 851.
- 40 *Id.* at 853.
- 41 *Id.* at 856.
- 42 *Id.* at 864 (Ripple, J., dissenting).
- 43 *Id.* (Easterbrook, J., dissenting).
- 44 *Id.* (Ripple, J., dissenting).
- 45 *Elmbrook School District v. John Doe 3*, 134 S. Ct. 2283 (June 16, 2014) (Scalia, J., and Thomas, J., dissenting).
- 46 *Elmbrook*, 687 F.3d at 864 (Ripple, J., dissenting).
- 47 *Id.* (Posner, J., dissenting).
- 48 Any public charter school that is explicitly religious in its educational mission and operations or otherwise sectarian in its operations, admissions policies, or other policies and practices, coined by some as “religious charter schools,” is generally thought to violate the Establishment Clause. Under federal regulations, such a school would fall outside the formal definition of a “charter school.” See *Charter School Programs*, 20 U.S.C. 7221i(1)(E) (2015). Yet according to some legal scholars, such schools are a part of the public charter school landscape. See Aaron Saiger, “Charter Schools, The Establishment Clause, and The Neoliberal Turn In Public Education,” *Cardozo Law Review*, Vol. 34, 1163 (April 2013); Craig N. Horning, “The Intersection of Religious Charter Schools and Urban Catholic Education: A Literature Review,” *Catholic Education* Vol. 16, No.2 (March 2013): 364–387; Benjamin Siracusa Hillman, “Is There a Place for Religious Charter Schools?,” *Yale Law Journal* 118 (December 22, 2008): 554–599. Concerns about the proliferation of “religious charter schools” and questions about the type of affiliation with a religious organization that would trigger the reasonable conclusion that a public charter school is in fact a “religious charter school” make it more difficult to evaluate the extent to which public charter schools may locate in a facility that is owned or operated by a religious organization without attracting undue legal scrutiny.
- 49 20 U.S.C. 7221i(1)(E) (defines “charter school”).

APPENDIX A: SAMPLE LEASE PROVISIONS

A. Public Charter School Lease/Sublease of Building Owned or Operated by Religious Organization

GENERAL PROVISIONS

Lease. Religious Organization (“Landlord”) leases to Public Charter School (“Tenant”) to enter and use a portion (the “Leased Premises”) of the Property, as set forth in the Facility Plan attached hereto as Exhibit ____, for the Permitted Use (as defined herein), subject to the conditions and restrictions set forth herein and in the “Shared Use and Additional Restrictions” exhibit attached hereto as Exhibit ____.

Permitted Use; Restrictions. Tenant shall use the Leased Premises for school and related administrative and ancillary purposes and no other purpose. Landlord acknowledges that, as an integral part of its charter, Tenant may not discriminate on the basis of race, ethnicity, national origin, religion, gender, sexual orientation, or disability in its operations, and must be nonsectarian in its programs, admissions policies, employment practices, and all other operations at the Property. In connection therewith, Landlord shall not engage in any activity or assert any conditions on the terms of this Lease that shall cause Tenant to breach the foregoing covenants and restrictions or otherwise injure Tenant’s business or reputation.

Landlord shall not (i) take any action inconsistent with the terms of the Lease, (ii) do or permit to be done anything prohibited under the Lease, or (iii) take any action or do or permit anything that would result in any additional cost or expense or other liability being incurred by Tenant under the provisions of the Lease. Landlord also shall not permit or itself conduct proselytizing, discrimination, or other activities on the Leased Premises during the period of use by Tenant.

Landlord Property Improvements. Landlord shall not make any alterations, additions, or improvements to the Property in the areas of the Leased Premises (“Landlord Improvements”) without first obtaining Tenant’s express written consent, which may be withheld if the Tenant has a reasonable concern that such Landlord Improvements may lead to the violation of Tenant’s obligation to be nonsectarian in its operations at the Leased Premises.

Independent Contractors. The contractual relationship established by this Agreement is solely one between independent contractors. This Agreement does not create

any partnership, joint venture, or similar business relationship between the Parties. Neither Party shall have the authority to make any statements, representations, or commitments of any kind, or to take any action, that shall be binding on the other Party, without the prior written consent of the other Party.

FACILITY PLAN

Facility Plan Language. Pursuant to the Commercial Lease (the “Agreement” to which this Exhibit ____ is attached), Tenant shall be entitled to use the following rooms on the Property (the “Leased Premises”), subject to the provisions of the Agreement:

[List all rooms, office spaces, common areas, and outdoor spaces.]

Facility Map. *[Include a facility map so that the exact location of the Leased Premises can be located on the map.]*

SHARED USE AND ADDITIONAL RESTRICTIONS

Exclusive Use. Pursuant to the Commercial Lease (the “Agreement” to which this Exhibit ____ is attached), Tenant’s use of the Leased Premises shall be exclusive throughout the term of the Agreement. In addition to the Leased Premises, Tenant and its personnel, students, and invitees shall have access during the term of the Agreement to the following common areas located on the Property:

[List all areas expected to be shared, such as parking spaces, restroom facilities, hallways, stairs and elevators, and dining facilities.]

[If the Parties do not know their specific need for use of the specific areas at the time of entering into the Lease, consider alternative language that would require the Parties to specify the areas expected to be shared upon a certain date and list them in a separate document that becomes part of the Lease Agreement.]

Shared Use. Landlord and Tenant shall share access and use of the Leased Premises, subject to the following:

1. Except as otherwise provided herein, Tenant shall have exclusive use of the Leased Premises during the following days and times of every calendar week during the term of the Agreement: Monday through Friday, ____ a.m. to ____ p.m.

2. Landlord shall have exclusive use of the Leased Premises at all other times during the term of the Agreement, except as otherwise below:
 - a. Tenant shall retain exclusive access and use of the _____ on _____.
 - b. Tenant shall have exclusive access and use of the _____ on _____.

[If a Tenant has not finalized its school or class schedule or calendar at the time of entering into the Lease and is unable to identify the specific areas and times it will need access to and use of the Leased Premises, consider alternative language that would require the Parties to provide the information requested in the Shared Use paragraph upon a certain date.]

Condition of Leased Premises. Landlord shall prepare the Leased Premises for Tenant by removing and/or concealing all religious symbols and paraphernalia from the space and keeping them locked up and not displayed except during those time periods expressly agreed upon by the parties and when Landlord has exclusive occupancy of the Leased Premises.

Signage. Tenant shall be permitted to post appropriate signage on the exterior of the building located on the Property to advertise its operation of the space as a school. Landlord shall maintain the sign(s) in good condition at all times. Conversely, Landlord shall remove and/or conceal any signage that exists to advertise its operation of the facility as a religious organization. Such removal or concealment shall be at the Landlord's own cost.

Separate Entrance for Tenant. To the extent possible, Landlord shall provide Tenant an exclusive and distinct entrance for use by Tenant, its students, families, personnel, and other guests. During Tenant's use of the entrance, Landlord shall use an alternative entrance.

Access to Leased Premises by Landlord Personnel. During the days and time periods in which Tenant is using the Leased Premises, Landlord shall have access to its administrative offices and other spaces only to the extent the areas can be reached without interfering with Tenant's enjoyment of the Leased Premises. All Landlord personnel accessing non-Leased Premises space during such times in a manner that brings them in contact with Tenant staff, students, or guests must sign in with Tenant's receptionist on arrival and departure.

PROPERTY TAX EXEMPTION

To the extent that the Property is, currently or at any time in the future, the beneficiary of a property tax exemption due to the exempt nature of the Tenant, Landlord shall indemnify and reimburse Tenant to the extent that Landlord's activities or occupancy causes such exemption to not apply, in whole or in part, to the Property.

B. Public Charter School Temporary Use of Space Owned or Operated by Religious Organization

GENERAL PROVISIONS

Grant of License: Licensor grants License to Public Charter School ("Licensee") to enter and use a portion (the "Licensed Premises") of the Property, as set forth in the Facility Plan attached hereto as Exhibit ____, for the Permitted Use (as defined herein), subject to the conditions and restrictions set forth herein and in the "Shared Use and Additional Restrictions" exhibit attached hereto as Exhibit ____.

Permitted Use; Restrictions. Licensee shall use the Licensed Premises for school and related administrative and ancillary purposes and no other purpose. Licensor acknowledges that, as an integral part of Licensee's charter, Licensee may not discriminate on the basis of race, ethnicity, national origin, religion, gender, sexual orientation, or disability in its operations, and must be nonsectarian in its programs, admissions policies, employment practices, and all other operations at the Property. In connection therewith, Licensor shall not engage in any activity or assert any conditions on the terms of this License that shall cause Licensee to breach any of the foregoing covenants and restrictions or otherwise injure Licensee's business or reputation.

Licensor shall not (i) take any action inconsistent with the terms of the License, (ii) do or permit to be done anything prohibited under the License, or (iii) take any action or do or permit anything that would result in any additional cost or expense or other liability being incurred by Licensee under the provisions of the License. Licensor also shall not permit or itself conduct proselytizing, discrimination, or other activities on the Licensed Premises during the period of use by Licensee.

APPENDIX A: SAMPLE LEASE PROVISIONS

Licensor Property Improvements. Licensor shall not make any alterations, additions, or improvements to the Property in the areas of the Licensed Premises (“Licensor Improvements”) without first obtaining Licensee’s express written consent, which may be withheld if the Licensee has a reasonable concern that such Licensor Improvements may lead to the violation of Licensee’s obligation to be nonsectarian in its operations at the Licensed Premises.

Independent Contractors. The contractual relationship established by this Agreement is solely one between independent contractors. This Agreement does not create any partnership, joint venture, or similar business relationship between the Parties. Neither Party shall have the authority to make any statements, representations, or commitments of any kind, or to take any action, that shall be binding on the other Party, without the prior written consent of the other Party.

FACILITY PLAN

Facility Plan Language. Pursuant to the License to Use Property (the “Agreement” to which this Exhibit ____ is attached), Licensee shall be entitled to use the following rooms on the Property (the “Licensed Premises”), subject to the provisions of the Agreement:

[List all rooms, office spaces, common areas, and outdoor spaces.]

Facility Map. *[Include a facility map so that the exact location of the Licensed Premises can be located on the map.]*

SHARED USE AND ADDITIONAL RESTRICTIONS

Exclusive Use. Pursuant to the License to Use Property (the “Agreement” to which this Exhibit ____ is attached), Licensee’s License to use the Licensed Premises shall be exclusive throughout the term of the Agreement. In addition to the Licensed Premises, Licensee and its personnel, students, and invitees shall have access during the term of the Agreement to the following common areas located on the Property:

[List all areas expected to be shared, such as parking spaces, restroom facilities, hallways, stairs and elevators, and dining facilities.]

[If the Parties do not know their specific need for use of the specific areas at the time of entering into the Agreement, consider alternative language that would require the Parties to specify the areas expected to be shared upon a certain date and list them in a separate document that becomes part of the Agreement.]

Shared Use. Licensor and Licensee shall share access and use of the Licensed Premises, subject to the following:

1. Except as otherwise provided herein, Licensee shall have exclusive use of the Licensed Premises during the following days and times of every calendar week during the term of the Agreement: Monday through Friday, ____ a.m. to ____ p.m.
2. Licensor shall have exclusive use of the Licensed Premises at all other times during the term of the Agreement, except as otherwise below:
 - a. Licensee shall retain exclusive access and use of the _____ on _____.
 - b. Licensee shall have exclusive access and use of the _____ on _____.

[If a Licensee has not finalized its school or class schedule or calendar at the time of entering into the License and is unable to identify the specific areas and times it will need access and use of the Licensed Premises, consider alternative language that would require the Parties to provide the information requested in the Shared Use paragraph upon a certain date.]

Condition of Licensed Premises. Licensor shall prepare the Licensed Premises for Licensee by removing and/or concealing all religious symbols and paraphernalia from the space and keeping them locked up and not displayed except during those time periods expressly agreed upon by the parties and when Licensor has exclusive occupancy of the Licensed Premises.

Signage. Licensee shall be permitted to post appropriate signage on the exterior of the building located on the Property to advertise its operation of the space as a school. Licensor shall maintain the sign(s) in good condition at all times. Conversely, Licensor shall remove and/or conceal any signage that exists to advertise its operation of the facility as a religious organization. Such removal or concealment shall be at Licensor’s own cost.

Separate Entrance for Licensee. To the extent possible, Licensors shall provide Licensee an exclusive and distinct entrance for use by Licensee, its students, families, personnel, and other guests. During Licensee's use of the entrance, Licensors shall use an alternative entrance.

Access to Licensed Premises by Licensors Personnel.

During the days and time periods in which Licensee is using the Licensed Premises, Licensors shall have access to its administrative offices and other spaces only to the extent the areas can be reached without interfering with Licensee's enjoyment of the Licensed Premises. All Licensors personnel accessing non-Licensed Premises space during such times in a manner that brings them in contact with Licensee staff, students, or guests must sign in with Licensee's receptionist upon arrival and departure.

PROPERTY TAX EXEMPTION

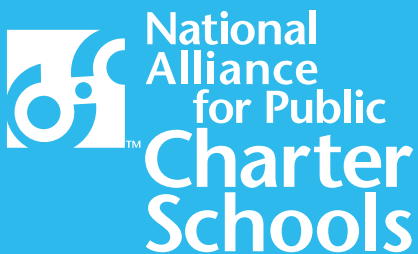
To the extent that the Property is, currently or at any time in the future, the beneficiary of a property tax exemption due to the exempt nature of the Licensee, Licensors shall indemnify and reimburse Licensee to the extent that Licensors' activities or occupancy causes such exemption to not apply, in whole or in part, to the Property.

About the National Alliance

The National Alliance for Public Charter Schools is the leading national nonprofit organization committed to advancing the public charter school movement. Our mission is to lead public education to unprecedented levels of academic achievement by fostering a strong charter sector. For more information, please visit our website at www.publiccharters.org.

About the Author

Lisa T. Scruggs is a Partner with Duane Morris LLP, and provides litigation and counseling services for education and school reform organizations, including individual charter and private schools, charter school networks, charter and education management organizations, school districts and other education non-profit and for profit organizations. She has handled a wide range of litigation, transactional and policy matters relating to new school development, teacher evaluation, credentialing and certification reforms, public/private education ventures, virtual education and parent and student rights.



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